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Wong Shee Kai v Government of Malaysia

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FEDERAL COURT (PUTRAJAYA) — SUIT NO BKA-1–08 OF 2021(W)
TENGKU MAIMUN CHIEF JUSTICE, ABANG ISKANDAR CJ (SABAH AND SARAWAK), VERNON ONG, RHODZARIAH BUJANG, MOHAMAD ZABIDIN FCJJ
6 OCTOBER 2022

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Constitutional Law — Courts — Federal Court — Whether litigant seeking to declare provision in statute invalid/void for being inconsistent with any provision in Federal Constitution ('inconsistency challenge') could not approach Federal Court directly for relief but had to file his challenge in the High Court — Whether Federal Court's original jurisdiction was only exercisable to determine challenge to validity of any law passed by Parliament or State Legislature on the ground those bodies had no power to make that law, and to determine disputes on any other question between States or between the Federation and any State — Whether even if leave under art 4(4) of Federal Constitution was wrongly granted to litigant to petition Federal Court to hear an inconsistency challenge, the panel hearing the substantive petition was entitled to set aside the leave order and strike out the petition — Whether grant of leave could not confer jurisdiction on the court to hear the petition when no jurisdiction existed in the first place — Whether leave could only be granted if there was jurisdiction — Federal Constitution art 128(1)

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The petitioner was granted leave by a judge of the Federal Court under arts 4(3) and (4) of the Federal Constitution ('the FC') to petition the Federal Court to declare ss 63 and 64 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUA') invalid and/or void for being inconsistent with arts 5 and 8 of the FC. At the instant hearing of the petition, the respondent's main objection was that the Federal Court did not have the original jurisdiction under art 128(1) of the FC to hear the subject-matter of the petition since it was not an 'incompetency challenge' (ie, that Parliament or a State legislature did not have the power to make a law) but an 'inconsistency challenge' (ie, that a law, or some part of it, was inconsistent with or contrary to some provision of the FC). The respondent pointed out that even though at the leave stage it had pointed out the court's lack of jurisdiction to hear the matter, leave to file the petition was nevertheless granted to the petitioner. The question before the instant panel was whether the court was bound to hear the petition since leave had been granted or whether it could set aside the leave order and refuse to hear the petition.

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Held, unanimously setting aside the leave order and striking out the petition:

(1) The petition disclosed an 'inconsistency challenge' poorly disguised as an 'incompetency challenge'. The petition was bad and incompetent. The subject-matter of the constitutional challenge in this case should have been raised at the High Court as it was beyond the exclusive original jurisdiction of the Federal Court. Since the requirements of art 4(3) of the FC were not met, leave to file the petition should not have been granted to the petitioner under art 4(4) of the FC. Allowing the petition to proceed any further would be an abuse of process of the Court (see paras 36–41).

(2) Although leave was granted and the petition was filed, it was still open to the instant panel of the court, in order to guard its exclusive original jurisdiction from abuse, to re-visit the grant of leave and to set it aside if it found that leave ought not to have been granted in the first place. The grant of leave could not confer jurisdiction where there was none in the first place. Leave could only be granted if there was jurisdiction, and so the grant of leave was not capable of becoming the basis for jurisdiction (see paras 9, 19–20 & 36).

(3) If it was found at any stage before, during or after the hearing of the merits of a petition that the initial grant of leave was bad for want of jurisdiction, this court was entitled, after hearing parties, to set aside the leave order previously granted. And following such setting aside, the petition having no leg to stand on had to be struck out as a matter of course. The power to set aside the previously-granted leave order was within the ambit of the inherent powers of this court. If at all a statutory provision was required for it, it was r 137 of the Rules of the Federal Court 1995 (see paras 9 & 21).

(4) Where constitutional issues could be raised before the High Court, they ought to be so raised there as being the first court in the judicial hierarchy to be entrusted with judicial power. Ignoring that and allowing cases to come directly to the Federal Court was to ignore our very own constitutional design (see para 18).

(5) Any challenge that required leave under art 4(4) of the FC was called an 'incompetency challenge' while all other challenges that could be brought before the High Court were called 'inconsistency challenges' even though the result of both might be that under art 4(1) the impugned provision of law was inconsistent with the Federal Constitution (see para 26).

(6) An 'incompetency challenge' involved a very specific allegation under art 4(3) that Parliament or the State Legislature had no power to make a law. And they required leave under art 4(4) before they could be initiated and the relief sought in the petition must be limited to a declaration that the relevant provision was invalid on the ground that the Federal or the State Legislature had no power to make it. These were the challenges that

fell under the original jurisdiction of the Federal Court under art 128(1). Any other 'inconsistency' challenge which alleged that a particular provision of law was invalid because it was inconsistent with the Federal Constitution — usually Part II — was not caught by art 4(3) and had to be brought in the first instance in the High Court (see paras 25 & 27–28).

(7) A pure 'inconsistency' challenge presupposed that Parliament (or the State Legislature) had the power to enact the impugned law or provision but that the provision was invalid because it was made in excess of a condition or restriction imposed by the Federal Constitution. The instant case was patently an 'inconsistency' challenge because ss 63 and 64 of AMLATFPUA were not challenged on the basis that Parliament had no power to make them but on the basis that they, having been made within power, exceeded the limits established by arts 5 and 8 of the FC (see paras 33, 38 & 40).

[Bahasa Malaysia summary

Pempetisyen telah diberikan kebenaran oleh hakim Mahkamah Persekutuan di bawah perkara 4(3) dan (4) Perlembagaan Persekutuan ('PP') untuk mempetisyenkan Mahkamah Persekutuan bagi mengisytiharkan ss 63 dan 64 Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('AMLATFPUA') tidak sah dan/atau terbatal kerana tidak konsisten dengan perkara 5 dan 8 FC. Pada pendengaran semasa petisyen tersebut, bantahan utama responden adalah Mahkamah Persekutuan tidak mempunyai bidang kuasa asal di bawah perkara 128(1) PP untuk mendengar perkara utama petisyen kerana ia bukan 'cabaran ketidakcekapan' (iaitu, Parlimen atau badan perundangan Negeri tidak mempunyai kuasa untuk membuat undang-undang) tetapi 'cabaran ketidakkonsistenan' (iaitu, undang-undang, atau sebahagian daripadanya, tidak konsisten atau bertentangan dengan beberapa peruntukan PP). Responden menegaskan bahawa walaupun pada peringkat kebenaran ia telah menunjukkan kekurangan bidang kuasa mahkamah untuk mendengar perkara tersebut, kebenaran untuk memfailkan petisyen tetap diberikan kepada pempetisyen. Persoalan di hadapan panel semasa adalah sama ada mahkamah terikat untuk mendengar petisyen tersebut oleh kerana kebenaran telah diberikan atau sama ada ia boleh mengetepikan perintah kebenaran dan enggan mendengar petisyen tersebut.

Diputuskan, sebulat suara mengenepikan perintah kebenaran dan membatalkan petisyen:

(1) Petisyen imendedahkan 'cabaran ketidakkonsistenan' yang dengan teruk menyamar sebagai 'cabaran ketidakcekapan'. Petisyen tersebut cacat dan tidak sempurna. Perkara utama cabaran perlembagaan dalam kes ini sepatutnya dibangkitkan di Mahkamah Tinggi kerana ia di luar bidang

kuasa asal eksklusif Mahkamah Persekutuan. Memandangkan keperluan perkara 4(3) PP tidak dipenuhi, kebenaran untuk memfailkan petisyen tidak sepatutnya diberikan kepada pempetisyen di bawah perkara 4(4) PP. Membenarkan petisyen diteruskan lagi akan menjadi penyalahgunaan proses mahkamah (lihat perenggan 36 & 41).

(2) Walaupun kebenaran telah diberikan dan petisyen telah difailkan, ia masih terbuka kepada panel semasa mahkamah, untuk menjaga bidang kuasa asal eksklusifnya daripada penyalahgunaan, untuk melawat semula pemberian kebenaran dan untuk mengetepikan jika ia mendapati bahawa kebenaran sepatutnya tidak diberikan pada mulanya. Pemberian kebenaran tidak boleh memberikan bidang kuasa di mana ianya tidak ada pada mulanya. Kebenarna hanya boleh diberikan jika terdapat bidang kuasa, dan oleh itu pemberian kebenaran tidak mampu menjadi asas bagi bidang kuasa (lihat perenggan 9, 19–20 & 36).

(3) Jika didapati pada mana-mana peringkat sebelum, semasa atau selepas pendengaran merit petisyen bahawa pemberian awal kebenaran adalah cacat kerana kekurangan bidang kuasa, mahkamah ini berhak, selepas mendengar pihak-pihak, untuk mengetepikan perintah kebenaran yang diberikan sebelum ini. Dan berikutan pengetepian sedemikian, petisyen yang tidak boleh dipertahankan terpaksa dibatalkan sebagai satu perkara yang pasti. Kuasa untuk mengetepikan perintah kebenaran yang diberikan sebelum ini adalah dalam lingkungan kuasa sedia ada mahkamah ini. Jika sama sekali peruntukan berkanun diperlukan untuknya, ia adalah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 (lihat perenggan 9–21).

(4) Jika isu perlembagaan boleh dibangkitkan di hadapan Mahkamah Tinggi, ia sepatutnya dibangkitkan di sana sebagai mahkamah pertama dalam hierarki kehakiman yang diamanahkan dengan kuasa kehakiman. Pengabaiannya dan membenarkan kes dibawa terus ke Mahkamah Persekutuan adalah mengabaikan reka bentuk perlembagaan kita sendiri (lihat perenggan 18).

(5) Sebarang cabaran yang memerlukan kebenaran di bawah perkara 4(4) PP dipanggil 'cabaran ketidakcekapan' manakala semua cabaran lain yang boleh dibawa ke Mahkamah Tinggi dipanggil 'cabaran ketidakkonsistenan' walaupun keputusan kedua-duanya mungkin di bawah perkara 4(1) peruntukan undang-undang yang dipertikaikan adalah tidak konsisten dengan Perlembagaan Persekutuan (lihat perenggan 26).

(6) 'Cabaran ketidakcekapan' melibatkan dakwaan yang sangat spesifik di bawah perkara 4(3) bahawa Parlimen atau Dewan Undangan Negeri tidak mempunyai kuasa untuk membuat undang-undang. Dan mereka memerlukan kebenaran di bawah perkara 4(4) sebelum mereka boleh

dimulakan dan relif yang diminta dalam petisyen mesti dihadkan kepada pengisytiharan bahawa peruntukan yang berkaitan adalah tidak sah atas alasan bahawa Badan Perundangan Persekutuan atau Negeri tidak mempunyai kuasa untuk membuatnya. . Ini adalah cabaran yang terletak di bawah bidang kuasa asal Mahkamah Persekutuan di bawah perkara 128(1). Sebarang cabaran 'ketidakkonsistenan' lain yang mendakwa bahawa peruntukan undang-undang tertentu adalah tidak sah kerana ia tidak konsisten dengan Perlembagaan Persekutuan — biasanya Bahagian II — tidak dihalang oleh perkara 4(3) dan perlu dibawa pada peringkat pertama di Mahkamah Tinggi (lihat perenggan 25 & 27– 28).

(7) Cabaran 'inkonsistensi' tulen mengandaikan bahawa Parlimen (atau Dewan Undangan Negeri) mempunyai kuasa untuk menggubal undang-undang atau peruntukan yang dipertikaikan tetapi peruntukan tersebut tidak sah kerana ia dibuat melebihi syarat atau sekatan yang dikenakan oleh Perlembagaan Persekutuan. Kes semasa tesebut secara terang-terangan merupakan cabaran 'ketidakkonsistenan' kerana ss 63 dan 64 AMLATFPUA tidak dicabar atas dasar bahawa Parlimen tidak mempunyai kuasa untuk membuatnya tetapi atas dasar bahawa mereka, setelah dibuat dalam kuasa, melebihi had yang ditetapkan oleh perkara 5 dan 8 PP (lihat perenggan 33 & 38–40).]

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)
Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)
Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor [2020] 2 MLJ 1, FC (refd)
Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng [2005] 1 MLJ 101, FC (refd)
Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417, FC (refd)
Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 323, FC (refd)
Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor [2020] 1 MLJ 398, FC (refd)
Petroliam Nasional Bhd (Petronas) v Kerajaan Negeri Sarawak [2018] 12 MLJ 43, FC (refd)
Rethana v Government of Malaysia [1984] 2 MLJ 52, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 63, 64
Courts of Judicature Act 1964 ss 84, 85, 96

Dangerous Drugs Act 1952 s 37(d), (da)
Education Act 1996 ss 17, 28
Federal Constitution arts 4, 4(1), (3), (3)(a), (3)(b), (4), 5, 8, 74, 121, 128(1), 152, Second Schedule, Part II, Ninth Schedule, List I, item 13, Lists II, III
Rules of the Federal Court 1995 r 137

Nahendran Navaratnam (with Wong Wye Wah and Ivanpal Singh Grewal) (AJ Ariffin Yeo & Harpal) for the petitioner.
Suzana bt Atan (with Kogilambigai) (Attorney General's Chambers) for the respondent.

Tengku Maimun Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This is a petition filed in the exclusive original jurisdiction of the Federal Court pursuant to leave granted by a judge of this court under art 4(3) and (4) of the Federal Constitution ('the FC'). The petition essentially sought to challenge the constitutional validity of ss 63 and 64 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATPUAA 2001').

[2] The reliefs sought vide para 18 of the petition are as follows:

> 18.1. A declaration that Section 63 of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 is invalid and/or void because it is inconsistent with and contrary to Article 5 and/or Article 8 of the Federal Constitution;
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> 18.2. A declaration that Section 64 of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 is invalid and/or void because it is inconsistent with and contrary to Article 5 and/or Article 8 of the Federal Constitution;
>
> 18.3. Such further and/or other reliefs deemed fit and just by this Honourable Court.

[3] Upon perusing the petition and upon considering the written and oral submissions of parties, we were constrained to strike out the petition. We now provide the grounds for our decision.

BACKGROUND FACTS

[4] The petitioner is a party to at least two criminal forfeiture proceedings initiated by the public prosecutor respectively in two separate criminal applications ('the motions'). In both the motions, the public prosecutor alleged that the petitioner has absconded and, on that basis, sought to invoke ss 63 and

64 of the AMLATPUAA 2001 against the petitioner. The petitioner opposed the motions and the motions have been stayed pending the disposal of this petition. For reasons that will be apparent later, we do not find it necessary to reproduce ss 63 and 64 of the AMLATPUAA 2001.

[5] The respondent, in their defence to the petition, resisted this petition on several grounds but the one we found most relevant is the argument that the subject-matter of this petition is an inconsistency challenge and not an incompetency challenge. The respondent thus maintained that the subject-matter of the petition is beyond the original jurisdiction of this court and as such, leave to file this petition ought not to have been granted. The respondent has been consistent in taking this position as they advanced the same argument at the leave stage which was evidently rejected.

[6] The respondent's objection raised a crucial question: can this court consider the question of its own jurisdiction to hear a petition once leave has been granted. In other words, can the court revisit the issue of whether leave ought not to have been granted in the first place, and if it is found that such a power exists, and the grant of leave is revisited, what is to become of the petition?

THE POWER OF THE SUBSTANTIVE PANEL TO REVISIT THE GRANT OF LEAVE UNDER ART 4(3) AND (4) OF THE FEDERAL CONSTITUTION

[7] The substantive provision conferring exclusive original jurisdiction to the Federal Court to hear certain limited matters is art 128(1) of the FC. The procedure for it is contained within art 4(3) and (4). For convenience, these provisions are reproduced below:

> Article 128
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> 128 (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction —
>
> (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
>
> (b) disputes on any other question between States or between the Federation and any State.
>
> Article 4
>
> (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of

A the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

B (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within para (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and
C the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under para (a) or (b) of the Clause.

[8] Article 4(3) carves out the specific subject matters upon which a
D petition may be brought in the original jurisdiction of the Federal Court. Article 4(4) then goes on to stipulate that leave of a judge of the Federal Court is required. It is safe to say that if the requirements of art 4(3) are not met, then prima facie, a judge of the Federal Court hearing the leave motion under art 4(4) is not entitled to grant leave.

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[9] In this case however, leave has been granted and the petition has been filed. Regardless, it is our view that it is open to this court to revisit the grant of leave and to set it aside, if it is found that leave ought not to have been granted in the first place. This power to set aside a previously granted leave order by the
F subsequent substantive panel for the petition is within the ambit of the inherent powers of this court. If at all a statutory provision is required for it, then it is to be found in r 137 of the Rules of the Federal Court 1995 ('the RFC 1995') which reads thus:

G 137 Inherent Powers of the Court

For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice *or to prevent an abuse of the process of the Court*. (Emphasis added.)

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[10] The application of the above provision can be understood in practical terms by reference to the decision of this court in *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1 ('Asia
I Pacific').

[11] That case concerned an appeal from the decision of a High Court judge on an amendment application which found its way to the Court of Appeal and then the Federal Court. Leave to appeal to the Federal Court was granted

pursuant to s 96 of the Courts of Judicature Act 1964 ('the CJA 1964') on two different questions of law unrelated to the question of appealability. During the hearing of the appeal proper, a preliminary objection was raised on whether the order/decision of the High Court judge was in the first place appealable. A majority of the Federal Court found that the matter was not in the first place appealable and as such, the Court of Appeal was not competent to hear the appeal. It followed that even the Federal Court was without jurisdiction to hear the leave questions.

[12] Now, even though the Federal Court in *Asia Pacific* did not directly refer to r 137 of the RFC 1995, the majority of this court, in the judgment of Idrus Harun FCJ, paras [107]–[108], when deciding whether they could reconsider the question of jurisdiction in spite of the grant of leave, referred no less to another prior judgment of this court in *Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 1 MLJ 101 ('Chan Yock Cher'). This is what this court held in *Chan Yock Cher*:

> From the cases, it is clear that, so far, this court had only given orders that its previous decisions, judgments or orders be set aside and ordered that the appeals be re-heard when such decisions, judgments or orders were a nullity or invalid because the court giving such decisions, judgments or orders was not properly constituted.
>
> We do not say that the circumstances under which this court would set aside its previous decisions, judgments or orders and for the re-hearing of the appeals are closed. Neither do we intend to list down the circumstances that warrant such an order. However, to give two examples, there may be jurisdictional error, for example, where the court inadvertently heard and decided on an appeal which, in law, is patently not appealable to this court, or due to illegality where this court inadvertently imposed a sentence unknown in law or in excess of the maximum sentence permissible by law.

[13] We are aware that both *Asia Pacific* and *Chan Yock Cher* concerned this court's appellate jurisdiction and that in *Asia Pacific*, this court did not set aside the leave order it previously granted. Instead, it allowed the appeal and set aside the decision of the Court of Appeal on the ground that the appeal was incompetent. These procedural issues decided in those cases are unique to appeals. This court in *Asia Pacific* was constrained to allow the appeal to set aside the decision of the Court of Appeal which was delivered without jurisdiction to restore the order of the High Court. Setting aside the leave order and striking out the appeal would not have achieved that purpose.

[14] Here, we are dealing with the original jurisdiction of the Federal Court, the primary procedure for which is provided for directly by the FC unlike say the procedure for leave to appeal in s 96 of the CJA 1964 (a statute).

[15] There is a reason why the original jurisdiction of the Federal Court is very limited, narrowly circumscribed and jealously guarded, as alluded to by Azmi FCJ in *Rethana v Government of Malaysia* [1984] 2 MLJ 52 at p 54, as follows:

> Under our Constitution, the Federal Court is an appellate court and its exclusive original jurisdiction is limited. In my opinion, this particular original jurisdiction of the Federal Court conferred by art 128(1)(a) read with s 45 of the Courts of Judicature Act 1964 should be strictly construed and confined to cases where the validity of any law passed by Parliament or any State Legislature is being challenged on the ground that Parliament has legislated on a matter outside the Federal List or Concurrent List; or a State Legislature has enacted a law concerning a matter outside the State List or the Concurrent List as contained in the Ninth Schedule to the Federal Constitution. *To extend the exclusive original jurisdiction of the Federal Court to matters which are not expressly provided by the Constitution would apart from anything else, deprive aggrieved litigants of their right of appeal to the highest court in the land.*. (Emphasis added.)

[16] The above passage was endorsed and cited with approval in a very recent judgment of this court in *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 323 ('Iki Putra') at para [23].

[17] The very confined nature of the jurisdiction of the Federal Court is borne out by the following. First, art 128(1) of the FC itself calls it the 'exclusive original jurisdiction' which suggests that no other court is capable of having it. Second, art 4(3) of the FC uses prohibitory language in that the validity of laws 'shall not be questioned' unless filed in the original jurisdiction for the exclusive reasons stated in paras (a) or (b) of that article. This means that the exclusive original jurisdiction is not to be invoked lightly.

[18] The other point is this. As many of the recent judgments of this court have clarified, art 4 of the FC must be read in harmony with art 121 of the same. The judicial power of the Federation is vested in the two High Courts and it must follow that where constitutional issues can be raised before the High Court, they ought to be so raised there as being the first court in the judicial hierarchy to be entrusted with such powers. Ignoring that and allowing cases to come directly to the Federal Court is to ignore our very own constitutional design. After all, even constitutional references must be initiated in the High Court, which court retains the discretion to decide whether to hear the constitutional challenge or to transmit them to the Federal Court under ss 84 and 85 of the CJA 1964.

[19] It must then follow as a matter of common sense that this court, in order to guard its exclusive original jurisdiction from abuse, must naturally have the inherent power to set aside any leave granted pursuant to art 4(4) of the FC if the narrow and specific conditions of art 4(3) were not met.

[20] To put it another way, while leave under art 4(4) of the FC is required to file a petition in this court's original jurisdiction to address the challenges contemplated in art 4(3) of the FC, the grant of leave itself is not the basis of jurisdiction of this court. Leave can only be granted if there is jurisdiction, and so the grant of leave is not capable of becoming the basis of jurisdiction.

[21] Thus, if it is found at any stage before, during or after the hearing of the merits of a petition that the initial grant of leave was bad for want of jurisdiction, this court is entitled, after hearing parties, to set aside the leave order previously granted. And once set aside, the petition having no leg to stand on must, as a matter of course, be struck out. The only question pending now is whether the present petition is caught by such circumstances.

WHETHER THE PRESENT PETITION IS BAD

[22] The jurisprudence on the interpretation of art 4(3) was very clearly explained by Suffian LP in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 ('Ah Thian'). Long after that judgment, the law entered a state of flux until it was eventually put right by this court in *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 ('Gin Poh'). In *Iki Putra*, this court went a step further and explained the difference between 'inconsistency' and 'incompetency' challenges with the view to simplifying the understanding of cll (1) and (3) of art 4. We shall now attempt to explain it again.

[23] The constitutionality of any written law may, depending on the circumstances, be challenged in the original jurisdiction of the Federal Court or in the High Court. Regardless of where it is challenged, if the law is found to be invalid, art 4(1) which stipulates that the law is void to the extent of the inconsistency, is triggered. The natural result is that the law will be struck down.

[24] Viewed in this way, every single constitutional challenge whether in the Federal Court's original jurisdiction or otherwise, is an inconsistency challenge. If the relevant Legislature had no power to make it, it is void under art 4(1). If the relevant Legislature had power to make it, but the law itself was in excess of limits demarcated by the FC or if that law violates fundamental liberties under Part II, then it is also inconsistent with the FC and shall be struck down under art 4(1). Again, this is because of the use of the word 'inconsistent' in art 4(1).

[25] In that sense, 'incompetency' challenges, are so to speak, a very defined species of 'inconsistency' challenges involving a very specific allegation under art 4(3) in that Parliament or the State Legislature had no power to make it. And, they require leave under art 4(4) before they can be initiated and the relief

sought in the petition must be limited to declaratory relief to the effect that the relevant provision is invalid on the ground that the relevant Legislature (Federal or State) had no power to make it. Article 4(3) and (4) do not otherwise contemplate any other form of relief. See generally: *Petroliam Nasional Bhd (Petronas) v Kerajaan Negeri Sarawak* [2018] 12 MLJ 43 paras [6]–[7].

[26] Thus, for ease of reference, any challenge that requires leave under art 4(3) of the FC is called an 'incompetency' challenge while all other challenges that can be brought before the High Court are called 'inconsistency challenges' even though the result of both might be that under art 4(1) the impugned provision of law is inconsistent with the Federal Constitution.

[27] To cite some examples, in a typical 'incompetency' challenge, there is an allegation that the State Legislature made a law which falls within the Federal List, or Parliament made a law which falls within the State List and is not supported by the Concurrent List, or that any Legislature (Federal or State) made a law which is not expressly sanctioned by any of the Legislative Lists in the Ninth Schedule of the FC. In short, the impugned law is invalid because the Legislature simply has no power to make it. This is unique to our FC because under art 4(1), it is the FC that is supreme and not Parliament or any of the State Legislatures. These legislative bodies are limited by the FC in the types of laws they are entitled to make. These are the challenges contemplated by art 4(3) which fall under the original jurisdiction of the Federal Court under art 128(1). The use of the phrase 'incompetency' challenge is merely for easy reference in practice.

[28] Any other challenge which alleges that a particular provision of law is invalid because it is inconsistent with the Federal Constitution — usually Part II — is not caught by art 4(3) and must be brought in the first instance, to the High Court. It is in this sense that such challenges are called 'inconsistency' if considered against 'incompetency' challenges.

[29] Thus, all 'incompetency' challenges are, in their broader sense, 'inconsistency' challenges, but not all 'inconsistency' challenges are 'incompetency' challenges. An 'inconsistency' challenge, being the larger concept, is incapable of being converted into the narrower concept of an 'incompetency' challenge. In other words, one cannot allege, for example, that a law is in violation of art 5 of the FC and since it is null and void premised on that inconsistency, Parliament or the State Legislature (as the case may be) is not empowered to make it. If that were the case, then there would be no reason for art 4(3) of the FC to specifically single out cases where allegations are made that the relevant Legislature had no power to make the law from all other types of challenges of constitutional validity.

[30] A specific example of this can be found in *Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor* [2020] 1 MLJ 398 ('Khairul Azam'). The applicant in that case sought leave to file a petition in the original jurisdiction of the Federal Court arguing that Parliament had no power to make ss 17 and 28 of the Education Act 1996 because they were inconsistent with art 152 of the FC. Azahar Mohamed CJ (Malaya) refused leave on the basis that the challenge was not, in essence, an incompetency challenge (although he did not explain it using that term). His Lordship held as follows:

> [22] Leaving the issue of the legislative competency of Parliament to enact the impugned provisions on one side for a moment, I am satisfied that the declaratory reliefs sought by the applicant do not come within the ambit of arts 4(3) and (4) of the Federal Constitution. The present leave application instituted by the applicant under art 4(4) is in essence, a challenge to the constitutional validity of the impugned provisions. This is not a case where declaration is sought that the impugned provisions are invalid on the ground that it is related to a matter with respect to which Parliament had no power to make such law. It would be wrong to conclude that this is a case where Parliament has strayed beyond matters within their legislative competence, with reference to the matters based on the legislative lists in the Ninth schedule. In substance, the primary declaration sought for in the present case is that the impugned provisions are inconsistent with art 152. If so, it would be void by reason of art 4(1). Hence, the declaratory reliefs sought for by the applicant are not within the exclusive original jurisdiction of the Federal Court. The declaratory reliefs sought for are within the original jurisdiction of the High Court. The High Court is competent to hear such challenges.

[31] Parliament was, in that case, found to be empowered to enact ss 17 and 28 of the Education Act 1996 under item 13 of the Federal List. The allegation that those provisions were unconstitutional were premised on their inconsistency with art 152.

[32] The *Khairul Azam* case assists to further appreciate the difference between 'inconsistency' and 'incompetency' challenges which can be explained in this way. In a country like the United Kingdom, the unwritten constitution mandates that Parliament is supreme. This means that Parliament itself is the conferrer of powers and its legislative powers are otherwise uncircumscribed. That is not the case in Malaysia. Here, Parliament (Federal) and the State Legislatures of the respective states were created by the FC and their powers are limited by it because the FC is supreme. In this regard, the powers of Parliament and the State Legislatures are conferred upon them by art 74 which reads thus:

> 74(1) Subject matter of Federal and State laws
>
> Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

A (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

B (3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

C **[33]** A pure 'inconsistency' challenge presupposes that Parliament (or State Legislature) has the power to enact the impugned law or provision but that the provision is not valid because it was made in excess of a condition or restriction imposed by the Federal Constitution. The various legislative entries are construed as liberally as possible so as not to limit the law-making powers (see *Gin Poh*, at para [52]). Taking *Khairul Azam* as an example, Parliament had the D power to enact ss 17 and 28 of the Education Act 1996 under the Federal List because they relate to education and so it is a separate matter entirely to say that though empowered to enact those sections, they ran afoul of the conditions or restrictions imposed by art 152 of the FC.

E **[34]** To summarise, any 'incompetency' challenge encompasses a situation where Parliament or the State Legislature is not in the first place, empowered to even enact the impugned law. It would not strictly matter in those circumstances whether the law exceeds other restrictions or conditions imposed by the Federal Constitution because the scrutiny in an 'incompetency' F challenge is to ascertain the source of the power to make that law with the view to seeking declaratory relief to the effect that the relevant Legislature (Federal or State) had no power to make that law.

APPLICATION OF THE LAW TO THE PRESENT PETITION

G **[35]** Having restated the law on the subject, we now turn to the present petition. We had earlier reproduced the prayers above and they are very patently an 'inconsistency' challenge that does *not* fall within the ambit of this court's original jurisdiction.

H **[36]** As such, there is clear non-compliance with art 4(3) of the FC and for this reason, leave ought not to have been granted under art 4(4) of the FC. And, as mentioned earlier, the grant of leave itself cannot confer jurisdiction where there is none.

I **[37]** For ease of reference, we also reproduce the grounds of the petition as follows:

16. Sections 63 and 64 of AMLA are void and/or invalid under Article 4(1) of the Federal Constitution because they are inconsistent with the Federal Constitution

on the following grounds:-

> 16.1. They subject the Petitioner to a double presumption that is disproportionate and unjustified;
>
> 16.2. They deprive the Petitioner of his presumption of innocence as guaranteed by Article 5 of the Federal Constitution; and
>
> 16.3. They treat the Petitioner differently from any other individual, thereby offending the right to equality guaranteed by Article 8 of the Federal Constitution ...

[38] The present challenge is hinged on arts 5 and 8 of the FC and this is therefore very patently an 'inconsistency' challenge. In fact, the reliefs sought in para 18 of the petition do not exclusively seek declaratory relief to the effect that ss 63 and 64 are invalid on the ground that Parliament had no power to make them, as envisaged by art 4(3) of the FC, but on the basis that they are inconsistent, inter alia, with arts 5 and 8 of the FC. The iteration in para 17 of the petition that 'Parliament has no power to make a law which is inconsistent with the Federal Constitution' does not convert this petition into an incompetency challenge.

[39] Further, we note that in the case of *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo'), the challenge mounted was on the application of a double presumption under s 37(d) and (da) of the Dangerous Drugs Act 1952. It will be recalled that there, an opposite objection was raised, ie, that the matter ought not to have proceeded by way of an appeal to the Federal Court but should have been brought in its exclusive original jurisdiction. The Federal Court, in following *Gin Poh*, overruled the objection. The arguments on art 121 of the FC and the double presumption hinged on arts 5 and 8 of the FC, was dealt with in its appellate jurisdiction. For the reasons stated above, we found that that was correctly done.

[40] In these circumstances, we do not consider it necessary to reproduce and read ss 63 and 64 of the AMLATPUAA 2001 because their constitutional validity is not being challenged on the basis that Parliament cannot make them, but on the basis that they having been made within power, exceeded the limits established by arts 5 and 8 of the FC.

CONCLUSION

[41] Based on the foregoing, we found that this petition disclosed an 'inconsistency' challenge poorly disguised as an 'incompetency' challenge. The petition is bad and incompetent. The subject matter of the constitutional

challenge in this case can and must be raised at the High Court and as such, is beyond the exclusive original jurisdiction of this court. It is therefore our view that leave to file the petition under art 4(4) of the FC ought not to have been granted and allowing this petition to proceed any further would be an abuse of the process of this court.

[42] In the circumstances, we set aside the leave order dated 5 January 2022, and the petition, having no leg to stand on, was struck out.

Leave order set aside and petition struck out.

Reported by Ashok Kumar